



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RSO, Inc.

File: B-250785.2; B-250785.3

Date: February 24, 1993

John R. Tolle, Esq., Barton, Mountain & Tolle, for the protester.
Terrence J. Tychan, Department of Health & Human Services, for the agency.
Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

When using other than competitive procedures due to unusual and compelling urgency, the agency has the authority to limit the procurement to the only firm it reasonably believes can properly meet its needs within the time available.

DECISION

RSO, Inc. protests the issuance of interim sole-source purchase orders to Ecology Services, Inc. (ESI) by the National Institutes of Health (NIH), Department of Health & Human Services, for radioactive waste management services. The purchase orders were issued for an interim period pending the award of a contract under a competitive solicitation. RSO, which had been determined to be technically unacceptable under the competitive solicitation, alleges that it was improperly not given an opportunity to compete for the interim purchase orders.¹

We deny the protest.

NIH issued competitive request for proposals (RFP) No. 263-92-P(BG)-0004 on November 5, 1991, to 108 potential sources. The services required included removal of hazardous

¹RSO previously filed a protest with our Office challenging its exclusion from the competitive range. After it received the agency report filed by the agency in response to its protest, RSO withdrew its protest concerning its exclusion as well as its contentions that the agency had improperly evaluated the successful offeror's proposal.

chemical, radioactive and mixed wastes which may be potentially explosive and which are located at thousands of NIH laboratories involved in biomedical research activities. Three offers were received by January 6, 1992, the closing date for receipt of initial proposals. The proposals were evaluated, and two firms, Laidlaw Environmental Services, Inc. and RSO, were included in the initial competitive range. The agency found that RSO's technical proposal contained major deficiencies, including its finding that RSO's operations plan consisted of nearly verbatim restatements of the RFP's technical requirements. Discussions were conducted, and revisions to the technical proposals were submitted by the two offerors. Following a second evaluation, the agency still found RSO's proposal deficient. For example, the agency found that the stabilization procedures proposed by RSO for some of the reactive waste streams could result in an explosion. The agency's technical evaluation team voted unanimously to assign a final rating of unacceptable to RSO's proposal.

On June 23, 1992, the agency notified RSO that its proposal had been excluded from the competitive range. RSO protested to the agency on July 10. In a letter dated August 3, RSO requested that the decision to remove RSO from the competitive range be reversed and that RSO receive a formal debriefing prior to award of the contract. A debriefing was held on September 23, and RSO filed a protest with our Office on October 7.

In the meantime, the agency conducted discussions with Laidlaw on August 18, and Laidlaw submitted four revisions to its business proposal. The anticipated start date of the contract (October 1, 1992) slipped to November 1, due to unexpected delays in the negotiation process with Laidlaw. Specifically, by September 30, discussions with Laidlaw stalled on the subject of profit/fee.

Previously, on August 21, the agency had decided to contact RSO to discuss a possible 1-month extension of its then-current contract for a portion of the work (radioactive waste removal services) included under the competitive RFP.² The agency notified RSO of NIH's intent to exercise the option in its contract for these services. After receipt of this notice, RSO submitted a proposal for price increase for the extended period, and stated that it would only accept a minimum three month extension. (During the protest, RSO characterized the prices under its then-9 month old contract, at which NIH wanted the firm to continue, as "extremely out of date".) NIH replied that it intended to

²Laidlaw's contract for chemical and mixed waste services was extended for the same reason.

exercise the option at the current contract prices. RSO refused to accept this extension on the basis that NIH had provided 30 days notice rather than the required 60 days notice before exercising the option. A number of times thereafter, NIH and RSO representatives discussed the firm's reservations about continuing services under its contract. NIH states that, as a result of these conversations, it became convinced that RSO was determined not to extend its contract.


The agency states that because RSO refused to accept a modification of its contract to extend the services and the only other qualified firm to submit a proposal for radioactive services was Laidlaw's subcontractor, ESI, the agency proceeded to issue a purchase order directly to that firm to ensure continuity of services (after executing a justification for other than full and open competition based on urgency). RSO then withdrew its first protest concerning the technical unacceptability of its proposal under the competitive RFP and filed a second and third protest concerning the propriety of the interim purchase orders to ESI. Award was made under the competitive RFP to Laidlaw on December 14, 1992.³ The services were provided by ESI on an interim basis under the purchase orders for 2-1/2 months.

An agency may use other than competitive procedures to procure goods or services where its needs are of such an unusual or compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits proposals. 41 U.S.C. § 253(c)(2) (1988). When citing an unusual and compelling urgency, the agency is required to request offers from "as many potential sources as is practicable under the circumstances." 41 U.S.C. § 253(e). An agency, however, has the authority to limit the procurement to the only firm it reasonably believes can properly meet its needs within the time available. Abbott Prods., Inc., B-231131, Aug. 8, 1988, 88-2 CPD ¶ 119. In situations such as this one, in which completion of a competitive procurement is delayed shortly before award by a protest or other short-term event, agencies typically satisfy their continuing need for the goods or services in question by executing modifications to the predecessor contract. Unified Industries, Inc., B-241010; B-241010.2, Dec. 19, 1990, 91-1 CPD ¶ 11.

³The agency concluded negotiations with LES on October 16, 1992. The record shows that the award was delayed past this date because of RSO's protest with our Office which was filed on October 7. The agency executed a determination and findings to proceed with the award notwithstanding the protest which was approved on November 2, 1992.

Under the circumstances, we will not object to the agency's decision to procure the interim services from ESI on a sole source basis instead of conducting a limited competitive acquisition for its short-term requirements. First, the record shows, and the protester does not dispute, that the services are critical to the mission of NIH. The loss, even temporarily, of radioactive waste disposal services would halt further deliveries of new radioactive materials to laboratories, interrupt biomedical research, and rapidly create serious health, safety, and environmental hazards. Second, the protester had declined to accept an extension of its current contract for the period needed by the agency and without a price increase. While the protester sent a letter to the agency on September 28, 2 days prior to the expiration of its contract, stating its willingness to "initiate discussions" concerning an extension on RSO's own terms, the agency reasonably disregarded this letter since it "did not address the concerns of when RSO's proposal would be complete or how negotiations could be completed within the 2-day timeframe." Thus, we think the agency reasonably considered Laidlaw's subcontractor, ESI, as the only viable source to provide the services for the short period of time caused by negotiation delays with Laidlaw and RSO's pending protest with our Office.

The protest is denied.



James F. Hinchman
General Counsel